No. 44520-4
~~No. 87393-3~~

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

VINCENT T. GRESHAM, an individual,

Appellant,

v.

Robbins GELLER RUDMAN & DOWD LLP, a limited liability corporation, and THE STATE OF WASHINGTON, OFFICE OF THE ATTORNEY GENERAL, Public Agencies,

Respondents.

BRIEF OF APPELLANT

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I. INTRODUCTION

This is the Public Records Act ("PRA") appeal that will ultimately determine whether government purchase decisions are subject to informed public oversight, or whether the process will be shrouded in secrecy. Raised herein are important statutory interpretation issues of first impression regarding the application of the PRA to one of the most important and ubiquitous state functions--the purchase of services and goods. This appeal will determine whether competitors for state business can keep secret information regarding fees they propose to charge the State, insurance they have to protect the State, and references they use to persuade the State of their competence and ethics.

The Superior Court ruled that a vendor law firm, Respondent Robbins Geller Rudman & Dowd ("Robbins"), could keep this information secret based on conclusory and generic arguments that would be equally applicable to any seeker of state business. The Superior Court erred by ruling that the basic factual information in public documents regarding proposed pricing, available insurance and references were all exempt from disclosure because all constituted "valuable formulae" under RCW 42.56.270(1), a protected trade secret or were exempt under RCW 42.56.270(11).

If the Superior Court's application of the PRA is upheld on appeal,

then any seeker of state business will be able to keep factual information that they provide to the state secret simply by claiming it is a "trade secret" or "valuable formulae." This secrecy will disable the public from questioning purchase decisions, much less being able to hold state bureaucrats accountable for purchase decisions. This secrecy will exponentially increase the opportunity for corruption of Washington's purchase decisions through bribes and kickbacks.

However, the impact of the Superior Court's decision to keep Robbins' fee proposal secret extends far beyond the borders of this state. Robbins is one of the largest class action firms in the country and in the last few years has sought hundreds of millions in fee awards from federal courts based on representations that market rates for securities actions are 30-40% of the awards. Is this 30-40% representation true?

Currently, due to the Superior Court's order, only this Court can examine the still secret fee proposal to see how it compares to Robbins' 30-40% representations to federal judges. However all class members (including the Washington State Investment Board) who pay the attorneys' fees and all federal judges who award fees should have access to the fee proposal. Robbins proposed fee structure is relevant to the issue of market rates in federal securities cases and keeping it secret is not in the public interest.

Here the Superior Court did not consider any of Requestor's public interest arguments because it used the generic balancing test for ordinary injunctions under **Tyler Pipe Indus., Inc. v. Dep't of Revenue**, 96 Wn.2d 785, 638 P.2d 1213 (1982), rather than the higher test under RCW 42.56.540 that is required for PRA injunctions. The Superior Court erred by failing to apply the required injunction standards in RCW 42.56.540.

Finally, long after ruling that Requestor did not prevail in his effort to obtain the public records (and thus at the time had no right to penalties, costs and fees), the Superior Court rendered an improper advisory opinion requested by the state on the then-moot issues regarding whether the conduct of the State violated the PRA so as to entitle Requestor to penalties, costs and fees if Requestor had prevailed. At that point there was no justiciable controversy and the Superior Court erred by ruling on a moot issue.

The Superior Court's incorrect permanent injunction order and its improper advisory opinion regarding summary judgment should both be reversed, and Requestor awarded fees, costs, and a statutory penalty.

II. ASSIGNMENTS OF ERROR

The Superior Court erred by awarding a permanent injunction to Robbins precluding disclosure of public records based on statutory exemptions that do not apply, and without applying the higher standards

required by RCW 42.56.540 and by awarding the State a summary judgment on the moot issue of costs, fees and penalties for records the court had already ruled should not be disclosed.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Superior Court err in allowing Robbins, a private party, to use RCW 42.56.270(1) to enjoin disclosure where the state agency owning the information stated it would disclose the public records at issue and never asserted that disclosure would cause public loss?

2. In determining whether "public loss" was shown under RCW 42.56.270(1) did the Superior Court err by ignoring the official state agency position in favor of the private opinions of its agents?

3. Did the Superior Court err by ignoring language in RCW 42.56.270(11) limiting the exemption to "health care" information provided to the "department of social health services" and applying this exemption to non-healthcare information submitted to the AGO?

4. Did the Superior Court err by ruling information to be a trade secret that (a) had been previously published by a national legal publication, (b) had been previously disclosed to other PRA requestors without objection, and/or (c) related to a single or ephemeral event (like a proposed fee agreement) rather than ongoing business methods?

5. Did the Superior Court err by using the general injunction standards that require only a balancing of the equities, rather than applying the higher standards required by RCW 42.56.540 which is the specific injunction statute applicable when a private party seeks to enjoin disclosure of public records?

6. After denying Requestor's public records demand, did the Superior Court err by ruling on the merits of the State's Motion for Summary Judgment relating to then moot claim for penalties, fees and costs thus depriving the court of a justiciable controversy?

IV. STATEMENT OF FACTS

The information in dispute in this case (the "Disputed Information") is all information voluntarily provided by Robbins to the Washington State Attorney General Office ("AGO") in 2010 in response to the AGO's Request for Qualifications and Quotations ("RFQQ") and consists of: (1) those names of participants in Robbins's Portfolio Monitoring Program ("PMP") whose names had already been published ("Type 1-"Published PMP Names") (CP 596-614); (2) information regarding the references Robbins provided to the state ("Type 2-"Reference Information") (CP 593-594); (3) Robbins' *Fee and Handling of Costs Proposal* ("Type 3-"Fee Proposal") (CP 590-591); and (4) Robbins's professional liability insurance information ("Type 4-"Malpractice Insurance") (CP 644).[1] This Disputed Information is contained in records that are indisputably public records. (CP 447 ¶10).

A. In Prior PRA Litigation With Competitors Robbins Did Not Contest Production Of The Same Type Of Disputed Information Sought Here

In 2004 Robbins's predecessor firm responded to an earlier RFQQ by the AGO (the "First Washington Response"). CP 680-700. The First Washington Response with all exhibits was 195 pages (CP 775 ¶6) and published the same types of information as the Disputed Information at

[1]The unredacted information that shows the precise nature of what was withheld is at CP 1466-1692.

issue here including: (1) Published PMP Names (CP 791-799); (2) Reference Information (CP 571 ¶31, 690-691); (3) Fee Proposal (CP 571 ¶32, 572 ¶¶34-36, 698-700, 694-695); and (4) Malpractice Insurance. CP 571 ¶¶26, 33, 695. Based on this information the AGO selected Robbins' to represent it in securities litigation. CP 775 ¶7.

In 2005, nine of Robbins' competitors filed PRA requests for Robbins' First Washington Response. CP 785 ¶8. Although Robbins' First Washington Response included all the same types of Disputed Information sought here, Robbins sought to enjoin production *only* of 118 PMP Names that had not previously been published. CP 775 ¶6, CP 50 ¶6, CP 779-780 ¶6-7. ("Plaintiff seeks to shield from public disclosure limited information...; the names of the 118 portfolio monitoring clients whose identity has not previously been disclosed." CP 784 ¶5.) The rest of the information in the First Washington Response-including information regarding fees and malpractice insurance-was voluntarily disclosed to Robbins' competitors without objection and without asserting that any exemption existed protecting it. CP 583 ¶¶50-53, CP 775 ¶6, CP 791-799. Requestor sought the same result from the Superior Court in 2012 asking for disclosure of Disputed Information except that with respect to the PMP Names, Requestor stated that the "participant names not previously published should be redacted from the Type 1 Secret

Information here, which is the common-sense approach previously taken by Judge Wickham." CP 1260.

Because Robbins did not seek to enjoin the AGO from releasing the Disputed Information in the First Washington Response in 2005, Robbins' law firm competitors obtained the Published PMP Names and Reference Information of the type that Robbins now claims must remain secret to avoid causing Robbins harm. CP 790-799. Malpractice insurance information, of the type that Robbins now claims would cause them irreparable harm, was not only disclosed but bragged about in representations of "$50-100 million in professional liability insurance, depending on the circumstances of a claim or claims, which we believe is the highest amount of professional liability insurance maintained by any firm practicing in the field." CP 571 ¶33, 695. Finally, Robbins allowed production in 2005 of all fee related information including an extensive discussion of fees and fee structures (CP 698-700) and a "fee grid" of the type Robbins seeks to keep secret. CP 700.

There is no evidence in the record that Robbins suffered any harm from the 2005 disclosure of the same type of Disputed Information from the First Washington Response.

B. In 2010 Information Robbins Now Claims Would Cause It Irreparable Harm If Published Was Published By A National Legal Publication And Not Only Did Publication Cause No Harm, Robbins Didn't Even Know Of It Until Requestor Told Them In 2011

More recently Robbins' 2010 response to a State of Florida RFQQ (the "Florida Response") was released by the State of Florida and extensively publicized by **The American Lawyer** a national legal publication[2] in a series of articles. See, e.g. "Slew of Client, Fee Details Found in Proposals From Fla. Pension Fund Beauty Contest." CP 350. Robbins Florida Response was not only the subject of articles,[3] but it was also published on The American Lawyer's web site at **amlawdaily.typepad.com/floridacoughlin.pdf**. As of September 24, 2012, it is still there.

Requestor served discovery seeking specific client or financial loss caused by publication of the Florida Response; however, Robbins disclosed no such losses. Robbins responded to Requestor's interrogatories with boilerplate objections and to his requests for

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[2] **The American Lawyer** reports a readership of 90,000, most law partners. CP 75.

[3] Robbins was publicized by name, for example one newspaper article discussed Robbins under the heading "**A gross conflict**" stating: "A former partner of one of the 12 firms... was sentenced to prison last year in a kickback scheme [whereby he] paid plaintiffs to get class-action business, and admitted he made false statements to judges." CP 354.

admissions by claiming it was "without sufficient information or knowledge to admit or deny this request." CP 860-864 RFA #5-12. In his deposition, not only was Mr. Robbins unable to cite any harm from the Florida publication. CP 1096-1097 at 57:8-58:13 ("As I sit here today, I am not able to cite you specific harm that followed from that."). He further admitted he only became aware that the Florida Response had been published when Requestor's pleadings so informed him. CP 1095-1096 at 56:10-57:7.

There is nothing in the record that proves Robbins (a) suffered any harm or loss from the disclosure of the First Washington Response to competing law firms or the national publication of the Florida Response, or (b) took any steps to protect the Florida information from disclosure or cause its removal from the American Lawyer's web site.

C. The AGO Based Procurement Decisions On Information Submitted By Robbins In The Washington Response

In 2010 Robbins provided information to the AGO in connection with another RFQQ (the "Second Washington Response") which contains the "Disputed Information". The State officials admit that this information is a public record (CP 447 ¶10) and they used this information in making decisions. CP 445 ¶4, CP 1132 at 12:10-13, CP 1176 at 56:21-23, CP 1177 at 57:20-22.

Since 2005 Robbins was on notice that the AGO would disclose their responses to Washington's RFQQ. CP 789 . Thus when Robbins submitted its Second Washington Response it was on notice of the AGO's position (CP 789), and that previously the Superior Court had *only* protected from disclosure the names of the PMP Names that had not been previously disclosed. CP 777. Thus Robbins was on notice that all the Disputed Information in the Second Washington Response was unprotected from disclosure, but Robbins voluntarily provided it anyway.

D. The AGO, As An Entity, Had No Objection To Requestor's PRA Request

Just as with the First Washington Response, the AGO as an entity[4] had no objection to disclosure, and was willing to produce Robbins Second Washington Response in its entirety. CP 447 ¶¶10-11. "The AGO does not independently assert or claim that any information in the [Robbins' Second Washington Response] is proprietary or confidential." CP 896 ¶6.

The AGO declined to redact any information because "the AGO is only permitted to redact information responsive to a public records request if it deems such information exempt under the Public Records Act. As the

[4]This time however, one AGO employee—who vigorously opposed disclosure--largely hijacked the AGO's response, and the Attorney General's Office did nothing to stop him or remedy the harm to Requestor. (See, §V.A).

AGO has not asserted any exemptions from disclosure... it was not permitted to redact any information..." CP 898 ¶9. This language demonstrates that the AGO, as an entity, did not agree with Robbins' exemption claims. **Id.**

The AGO did not claim that any public loss would result from the disclosure of the Disputed Information. CP 447 ¶¶10-11. CP 901 ¶16. The AGO was in a position to evaluate "public loss" from disclosure since the exact same type of information in the First Washington Response that had been previously disclosed to nine PRA requesters in 2005 (See §IV.A) and, notwithstanding that disclosure the AGO received at least 25 responses to its 2010 RFQQ, including Robbins. CP 445 ¶1.

E. Requestor's PRA Request Threatened To Expose Inconsistencies Between Robbins' Fee Representations To Federal Judges And Its Fee Proposal In The Second Washington Response

Over the years Robbins has consistently represented to federal court judges that market rates are an important criteria in the setting of securities class action fees. CP 576-581 ¶43, 579-584, 716-772. Additionally, Robbins has represented that the market rates for non-class securities actions is 30-40% of the recovery. Id. Robbins has used these representations to seek hundreds of millions in fee awards from federal judges. CP 574 ¶41, 576-581 ¶43, 716-772.

Robbins made similar representations to federal judges in the same 2010 time frame in which Robbins submitted its Fee Proposal as part of Robbins' Second Washington Response. For example, in **In re PMI Group, Inc. Securities Litg.,** No. 3:08-cv-01405-SI (N.D. Cal.), Robbins represented: "If this were a non-representative litigation the customary fee arrangement would be contingent, on a percentage basis and in the range of 30% to 40% of the recovery." CP 727. "Thus, the customary contingent fee in the private marketplace—30% to 40% of the fund recovered--is much higher than the percentage fee requested in this case." CP 728, fn. omitted.

Robbins makes representations about market rates and urges courts to award it fees based on market rates. CP 576-581 ¶43, 716-772. Robbins' Fee Proposal submitted to the AGO in response to the AGO's RFQQ is market rate information that would be highly relevant to federal judges who award fees. Yet Robbins seeks to keep information about the prices at which it is willing to undertake securities litigation secret.

Because fee information in the Second Washington Response is still secret, only this Court can look at the Disputed Information in the Second Washington Response regarding fees to see if it is or isn't consistent with Robbins' representations to federal court judges, including but not limited to its 30-40% "customary fee" representation that Robbins repeatedly

makes to federal judges awarding fees. See CP 1466-1692 (the sealed unredacted CPs.)

V. PROCEDURAL HISTORY

A. Agency Employees Assist Robbins' Efforts To Enjoin Disclosure Of Public Records The Agency Desired To Disclose

Once Robbins decided to sue Requestor to stop production of the records, Robbins contact person at the AGO assisted Robbins by providing sample legal documents to assist in its lawsuit (CP 1318-1341), drafted the AGO's pleadings so as to assist Robbins,[5] and worked hand in glove with Robbins in discovery. CP 1309-1316. This was not the only assistance AGO employees gave to those seeking to enjoin production of public records. CP 1189-1231.

B. Robbins Files A Complaint On 10/20/2011, Obtains TRO 10/21/2011, And By 11/4/2011 The Superior Court Granted A Preliminary Injunction And Stated That The Merits Had Already Been Determined And Only Remaining Issue For Trial Is Permanency Of Injunction

On 10/20/2011, Robbins filed a lawsuit against Requestor[6] and AGO seeking to enjoin disclosure of the withheld information. CP 5-10. Robbins sought a TRO and on 10/20/2011 (CP 428 ¶16) gave Requestor notice at 5:32 p.m. PST of a 10:30 a.m. hearing on the following day on

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[5] Robbins frequently cited the AGO's arguments in their own subsequent briefs as support for Robbins' position. CP 434-439.

[6] Pursuant to **Burt v. Washington State Department of Corrections**, 168 Wn.2d 828, 231 P.3d 191 (2010).

the other side of the country. CP 403. On 10/21/2011 Robbins obtained a TRO in an ex parte proceeding. CP 11-14. Requestor complained about the short notice stating: "Due process requires more than a few hours of an out-of-state TRO hearing..." CP 90-93, see also CP 1023-1024, RP 11/18/11 at 23:2-24:8).

On 10/28/2011 Robbins filed a motion to permanently enjoin Requestor and on 11/4/2011, the Superior Court awarded Robbins a preliminary injunction for all of the Disputed Information, overruling all of Requestor's pro se objections.[7] CP 413-415.

At that point, in the Superior Court's view it was all over because the Superior Court had already evaluated and ruled on the elements of injunctive relief and believed that the only remaining issue was whether the injunction should be permanent: "I've made the ruling. The question becomes one of should it be permanency." CP 1021, RP 11/18/11 at 21:16-17. "You know, I want to be real clear here. I already ruled the potential harm is available. That's a ruling I've made already. That when I did the preliminary injunction, the potentiality of harm was something

[7] One perhaps unintended consequence of **Burt** is to compress the time that Requestor has to react to being named as a defendant in litigation. Plaintiffs seeking injunctions, like Robbins, can plot and plan their strategy and cause defendant to have to quickly and successively defend both a TRO, then Preliminary Injunction in two weeks. The blitzkrieg process that a third party opposing disclosure can now utilize to steamroll PRA requesters should give this Court pause.

because of the confidentiality and trade secret, so I don't believe any discovery needs to be made in this case..." CP 1022, RP 11/18/11 at 22:12-18.

C. Over Requestor's Objection The Superior Court Orders A Rushed "Trial" Schedule Before The Case Is Even At Issue Which Prejudices Requestor

As an out of state defendant, Requestor's responsive pleading was not due until 12/23/2011. CP 1026, RP 11/18/11 at 26:2-4. Requestor asked the court to wait until the case became at issue with the filing of Requestor's Answer, cross and counter claims before setting the schedule. CP 420. However on 11/18/2011, the Superior Court insisted on establishing the schedule before the case became at issue and set a schedule requiring Requestor's opposition to Robbins permanent injunction motion to be filed 2/3/2012. RP 11/18/11 at 26:2-7. At the hearing Requestor argued, to no avail, that the rushed schedule violated his due process rights because it allowed insufficient time for discovery. RP 11/18/11 at 23:2-24:8. Although Requestor served discovery with his Answer, Cross and Counter-Claims it wasn't due until 1/23/2012 just 12 days prior to the 2/3/2012 due date for his brief (CP 840, leaving no time to serve follow up discovery or file motions to compel if opponents' responses were inadequate. RP 11/18/11 at 23:2-24:8

D. Requestor Unsuccessfully Sought Discovery To Refute Robbins' Conclusory Trade Secret Claims Of Secrecy And Harm

To support its trade secret argument, Robbins made two claims with respect to all of the Disputed Information. **First** that: "Robbins Geller has taken reasonable efforts to maintain the secrecy of this information." CP 470-471 ¶¶14, 16, 18. **Second** that disclosure to Requestor "would cause substantial and irreparable harm to both the Firm and its clients." CP 470 ¶15).

Requestor's Interrogatories 5, 6 & 7 all sought information regarding prior disclosures of "trade secret" information that would help refute Robbins' claim that it had taken steps to keep information secret. CP 821-823. Specifically Robbins was asked to "identify all government entities to which any of the Secret Information has been disclosed in the last 5 years" (#5); state whether such information was "identified as being confidential or secret" (#6) and whether "any of the government entities.... themselves disclosed any Secret Information to any requestor of public records?" (#7). CP 821-823.

Just as Robbins failed to take steps to protect the Disputed Information in the First Washington Response (See, §IV.A) and Florida Response (See, §IV.B), complete answers to these

Interrogatories could disclose further instances of where Robbins had voluntarily disclosed or allowed disclosure of some or all of the Disputed Information. However, Robbins answered these interrogatories with nothing but objections. CP 821-823.

Requestor also sought discovery of any actual harm that had actually occurred from the actual publication of all or some of the disputed information. CP 827-828, 860-864.

Interrogatories 15, 16, and 17 respectively asked Robbins to "identify all specific incidences of where your competitors utilized the Florida Information to cause RGRD harm... (#15); "describe all financial losses caused by the disclosure..." (#16) and "describe all other harms or damages RGRD incurred due to the disclosure ..." (#17). CP 827-828. Similarly, in a series of Requests To Admit #5-12, Requestor asked Robbins to admit that publication of the Florida Information (Type 1, 2, 3, & 4) caused "no client loss" and "no financial loss." CP 860-864.

Robbins answered these interrogatories with nothing but objections (CP 827-828) and evasively responded to all requests to admit that it was "without sufficient information or knowledge to admit or deny this request." CP 860-864. Robbins' responses to discovery did not identify any instance of harm, financial loss, or damage from the prior disclosure

of Robbins' First Washington Response or Florida Response and there is no evidence of any actual harm that occurred from any prior disclosure in the entire record. CP 827-828, 860-864.

E. Superior Court Denies Requestor Relief From Robbins' Discovery Avoidance , And Awards Robbins Permanent Injunction

Requestor received not one document in response to his requests for production, his interrogatories were mainly responded to with boilerplate objections, and his requests for admissions that Robbins suffered no damages from prior disclosure was met with claims that Robbins had "insufficient information" to know if it was or was not damaged. (See, §V.D). Requestor sought relief through a motion seeking either a continuance (so that the discovery issues could be addressed) or alternative relief consisting of inferences that the discovery would have been adverse to Robbins.

At the 2/17/2012 trial Superior Court first denied any relief based on Robbins' discovery failures. RP 2/17/12 at 20:15-18. With respect to Robbins' Motion for Permanent Injunction Relief the Superior Court ruled in favor of Robbins and in an order dated February 17, 2012, the Superior Court found that all three claimed exemptions applied and disclosure would harm Robbins. CP 1342-1344. However, it did not address the

specific additional requirement in RCW 42.56.540 requiring proof that disclosure "would clearly not be in the public interest." **Id.**

F. Superior Court Gives The AGO An Advisory Opinion

After the court had ruled that Requestor had no right to the information sought, the State then moved for summary judgment on the now moot Requestor's claim for fees and penalties. RP 4/20/2012 at 3:15-18. Requestor argued that the State's motion was moot in that the Court had already effectively determined no fees or penalties were due because Requestor did not meet the condition precedent of prevailing. RP 4/20/2012 at11:11-12:21. Judge Dixon (Judge Pomeroy had retired) ruled in favor of the state. RP 4/20/2012 at 17:13-22:25.

VI. STANDARD OF REVIEW

Appeals under the PRA are subject to de novo judicial review. 42.56.550(3); **Neighborhood Alliance of Spokane County v. County of Spokane**, 172 Wn. 2d 712, 715, 261 P.3d 119, 125 (2011) ("**Neighborhood Alliance**"). In addition, Issues #1-5 concern the statutory interpretation of the PRA and are reviewed **de novo**. **Burton v. Lehman**, 153 Wn. 2d 416, 422, 103 P.3d 1230, 1234 (2005). Issue #6 is akin to discovery issue and is reviewed under the abuse of discretion standard. **Doe v. Puget Sound Blood Ctr.,** 117 Wn. 2d 772, 778, 819 P.2d 370, 373 (1991). Issue #7 concerns a summary judgment proceeding

which is reviewed de novo. (**Shellenbarger v. Brigman,** 101 Wn. App. 339, 345, 3 P.3d 211, 215 (2000).

VII. ARGUMENT

A. The PRA's Important Role In Protecting The Public Interest

The Public Records Act (the "PRA") became law in 1972 by the direct vote of the people. It's mission could not be more clear: "The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected." RCW 42.56.030. The Supreme Court has repeatedly emphasized the PRA's important goal of facilitating public disclosure. **See e.g., Neighborhood Alliance**, 172 Wn. 2d at 714, 261 P.3d at 125 ("The PRA is a strongly worded mandate for the broad disclosure of public records.") The purpose of the PRA is "nothing less than the preservation of the most central tenants of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions." **Progressive Animal Welfare Society v. University of Washington,** 125 Wn.2d 243, 251, 884 P.2d 592, 597 (1994) ("**PAWS**"); **Spokane Police Guild v. Washington State Liquor Control Bd.**, 112 Wn. 2d 30, 33, 769 P.2d 283, 284 (1989) ("The provisions of the act are to

be liberally construed to promote access to public records so as to assure continuing public confidence in governmental processes, and to assure the public interest will be fully protected.").

B. The Court Erred In Ruling Applicable Three Inapposite PRA Statutory Exemptions

As set forth below the Superior Court erred in ruling upon several issues of first impression with respect to three PRA exemptions: the "Valuable formulae" exemption under RCW 42.56.270(1), the health care exemption under RCW 42.56.270(11), and the trade secret exemption.

1. The 5-Year State Intellectual Property Exemption Of RCW 42.56.270(1) Does Not Apply Where The State Approves Of Disclosure And, In Any Event, Does Not Exempt Ordinary Vendor Pricing, Insurance and Reference Information

In no reported case has any court applied RCW 42.56.270(1) to allow a third party to enjoin disclosure of a public record that the agency itself was willing to disclose.

a) The Superior Court erred in allowing Robbins, a private party, to use RCW 42.56.270(1) to enjoin disclosure where the state agency owning the information intends to disclose the information and is not asserting that disclosure would cause public loss.

RCW 42.56.270(1) is a carefully worded exemption for "Valuable formulae, designs, drawings, computer source code or object code, and research data obtained by any agency within five years of the request for disclosure when disclosure would produce private gain and public loss."

This case raises an issue of first impression regarding the rights of private parties to use RCW 42.56.270(1) to block disclosures of public records where (as here) the state agency is willing to disclose and does not assert public loss.

The purpose of this exemption is so that "an **agency is not obligated to disclose** 'valuable formulae, designs... [etc.].'" (emphasis added) **Evergreen Freedom Foundation v. Locke**, 127 Wn. App. 243, 249, 110 P.3d 858, 862 (2005) ("**Evergreen**"). Here 42.56.270(1) does not apply because the issue is not the agency's "obligation" to disclose, but rather the ability of a third party to prevent the agency from voluntarily disclosing. Only if the agency itself desires to avoid disclosure does the need for the 42.56.270(1) protection against an agency having an "obligation to disclose" arise. Because here the AGO was willing to disclose all of the Disputed Information, the exemption in 42.56.270(1) which is designed to protect agencies from being forced to disclose is not applicable.

That RCW 42.56. 270(1) is not applicable to protect private third parties, like Robbins, is also demonstrated from the Supreme Court cases examining RCW 42.56. 270(1) which also make it clear that this section protects the state's ownership rights in intellectual property. The "public loss" component must come from the diminishment in value of the

information to the state. As the Supreme Court first held in **PAWS**, "the Public Records Act **protects recently acquired intellectual property from being converted to private gain**." (emphasis added) **PAWS**, 125 Wn.2d at 255, 884 P.2d at 599. **PAWS** involved valuable state patents, the disclosure of which would have allowed private third parties to infringe, thus **converting** the public's value in the patent into "private gain" which would result in "public loss." **PAWS**, 125 Wn.2d at 255. ("[T]he disclosure would produce both the private gain constituted by potential intellectual property piracy and the public loss of patent or other rights.").

Here, however, there is no "conversion" because disclosure of the Disputed Information that Robbins provided to the State does not reduce its utility or value to the State. The State can still use the factual information consisting of the fee proposal, insurance information, and client references whether or not they are disclosed to Requestor.

This fact also sets this case apart from other reported cases finding a RCW 42.56.270(1) exemption. For example, **Servais v. Port of Bellingham**, 127 Wn. 2d 820, 833, 904 P.2d 1124, 1131 (1995) addressed the potential "public loss" from public disclosure of a cash flow analysis commissioned by the Port of Bellingham to provide data it could use in negotiations with developers. 127 Wn.2d at 823.

Servais illustrates the important difference between "Valuable Formulae" information exempted from disclosure and the Disputed Information here. The value of the **Servais** information to the agency would clearly be destroyed by public disclosure because it would become known to the very parties the agency was negotiating against. In **Servais**--like all published decisions finding an exemption under 42.56.370(1)--the agency objected to disclosure, and in determining that this information should remain exempt, the Supreme Court held that nondisclosure would "permit the Port to conduct negotiations **in the best interests of the public** and to perform **its** statutory duties." **Id.** (emphasis added). In **Servais** as in its other decisions the Supreme Court focused on avoiding harm to the agency that the agency would suffer upon publication.

In contrast to both **PAWS** and **Servais**, here the agency neither objected to disclosure nor asserted any harm from disclosure of the Disputed Information. Moreover also unlike in **PAWS** and **Servais**, disclosure of the Disputed Information had no impact on its value to the agency.

Most recently, Division Two in **Evergreen** also clearly focused on the public loss, not private. That court recognized that the purpose of this exemption was to prevent private gain from "exploitation of potentially valuable intellectual property created for public benefit." **Evergreen,** 127

Wn. App. at 249, 110 P.3d at 862. In holding that information was exempt from disclosure, the court noted that "interference would, in turn, harm the public if it compromised the viability of the Department's agreement with Boeing." 127 Wn. App. at 249-250.

The Superior Court's expanded interpretation of RCW 42.56.270(1) to situations in which the agency neither objects nor suffers harm and where publication of the information has no impact on its value to the agency is flatly inconsistent with both RCW 42.56.030 which instructs that exemptions must be "narrowly construed"[8] and the language in RCW 42.56.270(1) which speaks only of "public loss", thus ignoring private loss which is the motivating factor for third-party enjoiners, like Robbins. (Even the statute's 5-year sunset provision is tied to the agency's acquisition date not the useful life of the intellectual property to third parties like Robbins.) Supreme and Appellate Court interpretation as well as the clear statutory language all demonstrate that this exemption is inappropriately used by third parties seeking to prevent voluntary agency disclosure.

Accordingly, as a matter of statutory language, court interpretation and policy, RCW 42.56.270(1) cannot be asserted for the sole purpose of

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[8] **See, King County v. Sheehan**, 114 Wn.App. 325, 338, 57 P.3d 307 (2002) ("the thrice-repeated legislative mandate that exemptions under the public records act are to be narrowly construed").

protecting a private party where the state agency is willing to disclose the information, asserts no "public loss" from publication and the value of the information itself is not diminished through publication. This exemption is simply not applicable here.

b) The Superior Court Also Erred By Ignoring The Official State Agency Position Regarding Public Loss In Favor Of The Private Opinions of Third Parties

A second issue of first impression under RCW 42.56.270(1) is how the "public loss" element of RCW 42.56.270(1) is determined. Here the state agency did not oppose disclosure or assert public loss. However, the employee in the state agency who handled the bidding process on behalf of the state agency (and whose own actions might be subject to review and criticism if all information became public) strongly held a different view. This employee vigorously fought disclosure (See §V.A) which efforts included expressing his private opinion that the public did not need to see the Disputed Information and that disclosure may make some firms less likely to participate in future RFQQs. CP 1181 at 61:3-8.

Giving state bureaucrats the opportunity to block disclosure an agency supports, merely by claiming disclosure might chill the bidding process gives secrecy seeking bureaucrats carte blanch to thwart public

scrutiny.[9] State bureaucrats who select bidders and maintain close ongoing ties to bidders will often prefer secrecy because disclosure would only allow the public to second-guess their purchase decisions and scrutinize the bidder-buyer relationship. Perversely, the incentives for secrecy are the highest where state decisions are motivated by bribery or other criminal wrongdoing.[10]

Similarly, Robbins own opinion as to public loss is irrelevant. The only opinion that matters under RCW 42.56.270(1) is the state agency's. If Robbins disagrees then its proper course of action is to lobby the state agency to see things its way, or to take legal action against the agency. See, **Ameriquest Mortg. Co. v. State Atty. Gen**., 148 Wn.App. 145, 199 P.3d 468 (2009). In **Ameriquest** a third party objected to the AGO's alleged waiver of applicable exemptions and disclosure of documents. The **Ameriquest** Court held that the third party had standing to take legal action against the AGO, but had the burden of showing "the AGO's

[9] If a bureaucrat believes that disclosure could create public loss, then their proper course of action is to persuade their bosses to refuse disclosure, not to go rogue by trying to thwart requesters, assist enjoiners or speculate about public losses that the agency itself doesn't recognize.

[10] Close scrutiny of public purchases of goods and services is needed to deter and detect kick-backs and bribes. See, e.g., **State v. Morton**, 83 Wn. 2d 863, 864, 523 P.2d 199, 200 (1974)(School principal convicted of the crime of receiving a secret bribe in exchange for influencing the school district's purchase of goods).

behavior was arbitrary and capricious." 148 Wn.App. at 167, 199 P.3d at 477.

The **Ameriquest** Court did not allow the third party to simply step into the AGO's shoes to assert the AGO's exemption. Other courts across the country have held that if a "government harm" factor was not sufficiently important to the state to withhold disclosure on that basis, then a third party's assertion of the argument on the state's behalf is not well taken. **See, Hercules, Inc. v. Marsh,** 839 F.2d 1027, 1030 (4th Cir.1988) (submitter would not be allowed to argue government "impairment" prong on the government's behalf); **Orion Research Inc. v. EPA,** 615 F.2d 551, 554 (1st Cir.) (stating that "[t]he agency is in the best position to determine the effect of disclosure on its ability to obtain necessary technical information"). The Superior Court erred by ignoring the official agency position in favor of the private opinions of an agency employee and the third party seeking an injunction.

c) Robbins Bid Material Is Not Exempt Intellectual Property

RCW 42.56.270(1) protects only intellectual property such as "formulae, designs, drawings, computer source code or object code, and research data..." The Disputed Information is not intellectual property but rather basic factual information regarding (a) the proposed fees at which Robbins was willing to work, (b) the malpractice insurance Robbins has,

and (c) information of Robbins' references and previously published PMP names.

This type of garden variety financial and commercial information was well known to the Washington Legislature which, in numerous exemptions under RCW 42.56.270 referenced "financial" and "commercial" information in various exemptions (e.g., RCW 42.56.270 subsections 2-10(a), 12(a), 13-15, 18, 20, and 21). Notably the legislature did not include "financial" or "commercial" information in the list of intellectual property items set forth in and protected by RCW 42.56.270(1). The Superior Court's expansionistic reinterpretation of RCW 42.56.270(1) to include garden variety, financial and commercial information that the legislature left out of the intellectual property list in RCW 42.56.270(1) violated the rule of construction that a court should not "add words or clauses to an unambiguous statute when the legislature has chosen not to include that language." **State v. Delgado**, 148 Wn.2d 723, 727, 63 P.3d 792, 795 (2003).

Finally, Robbins' "Fee And Handling of Costs Proposal" does not fit within the definition of the information protected by RCW 42.56.270(1) because it is analogous to an offer for a unilateral contract. As Division Three determined a contract is not exempt. **Spokane Research & Def. Fund v. City of Spokane**, 96 Wn.App. 568, 576, 983 P.2d 676 (1999)

("**Spokane Research**") ("First, the Nordstrom lease does not meet the definition of research data because it is simply a contract outlining the obligations of the parties. It may be the end product of research, but it would not disclose the research.") Just as a contract doesn't fit within this exemption, an offer for a contract doesn't fit either. Based upon the holding in **Spokane Research** the fee proposal is clearly excluded from RCW 42.56.270(1).

2. In A Case Of First Impression, The Superior Court Erred In Misinterpreting RCW 42.56.270(11) To Apply To Any Information Rather Than Information Supplied To "Social And Health Services."

RCW 42.56.270 sets forth various exemptions and organizes these exemptions based upon which of 21 different state entities or state purposes the information was submitted to or for. RCW 42.56.270 (11) is the section that applies to information submitted "to the department of social and health services for purposes of the development, acquisition, or implementation of state purchased health care..." Robbins is not such a vendor and this exemption does not apply. No reported Washington Case has ever interpreted RCW 42.56.270(11) as a broad catch-all exemption and the Superior Court erred in doing so.

3. The Superior Court Erred In Interpreting The Trade Secret Exemption To Cover Information Previously Published or Voluntarily Disclosed Which Related To A Single Or Ephemeral Event (Like A Vendor's Proposed Pricing) Rather Than Ongoing Business Methods.

Other issues of first impression relate to the scope of the "trade secret" exemption. First, whether information that is arguably a "trade secret" can lose its "secret" status through publication. Another issue of first impression in Washington is whether a "trade secret" is limited to information regarding business methods (for example a secret formula for manufacturing a soft drink) or includes garden variety factual information related to a single or ephemeral event (such as the proposed fees of a vendor seeking state business).

a) Robbins Fails To Prove It Took Reasonable Steps To Maintain The Secrecy Of The Withheld Information

Robbins bore the burden of proving the existence of a trade secret. Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 49, 738 P.2d 665, 674 (1987). Robbins sought to bear its burden by submitting self-serving testimony that parrots the exemption requirement to have "taken reasonable efforts to maintain the secrecy of this information..." CP 470-471 ¶¶14, 16, 18, the "Walton Declaration". Although the Walton Declaration vaguely alludes to reasonable efforts to maintain secrecy, it doesn't address the concrete examples where Robbins did not (a) oppose

the PRA request for the Disputed Information in the First Washington Response or (b) take action to prevent the publication of Robbins' Florida Response or remove it from the **American Lawyer**'s web site.

Here the Walton declaration and Mr. Robbins' deposition testimony upon which Robbins relies are too vague, conclusory and argumentative, and thus do not provide a factual basis supporting a trade secret exemption. **Spokane Research**, 96 Wn. App. at 578 ("the Developers' argument lacks a factual basis because the opinions claiming harmful effect are argumentative assertions, thus merely conclusory....") **See also**, **McCallum v. Allstate Prop. & Cas. Ins. Co.**, 149 Wn. App. 412, 426, 204 P.3d 944, 951 (2009) (rejecting declarations because they failed to provide "concrete examples" showing uniqueness of information and instead "consist[ed] of conclusory statements that should its competitors gain access to [the secret information], the competitors will gain an unfair advantage.); **Woo v. Fireman's Fund Ins. Co.**, 137 Wn. App. 480, 489, 154 P.3d 236, 240 (2007)(The court rejected declarations as "too conclusory" because "[t]he declarations do not supply any concrete examples to illustrate how the strategies or philosophies of Fireman's Fund claims handling procedures differ materially from the strategies or philosophies of other insurers.").

Moreover, the declaration speculates about the harm Robbins would suffer if any of the Disputed Information was disclosed, but fails to address the concrete disclosures of the same type of information in the First Washington and Florida Responses. In light of the disclosures of the First Washington Response and Florida Response, Robbins should be in a position to prove with concrete actual examples the "substantial and irreparable" harm it has already suffered from previous disclosures. The declaration is loudly silent on any actual harm that occurred. All claims of harm are based solely on self-serving testimony consisting of speculation about harm they have not in fact suffered.

Requestor served specific interrogatories asking about harm Robbins suffered but Robbins still failed to provide any example of any harm it has ever suffered due to the disclosure of information. (See, §V.D) Requests for admissions directed at the issue of Robbins' harm, if any, was responded to by claiming that Robbins had insufficient information to know if it had been harmed or not. (See, §V.D). Nowhere has Robbins produce any documentary, expert or other record evidence supporting Robbins's claims of harm from publication.

b) Garden Variety Financial And Commercial Information Requested By A Potential Buyer Of Services Is Not A Trade Secret Pertaining To Business Methods

The garden variety factual information concerning Robbins' proposed fee, malpractice insurance and references are not trade secrets. Rather trade secrets must relate to the methods of production of product or providing of services. Although this is a matter of first impression, the Supreme Court in **PAWS** strongly implied this to be the law in Washington, albeit in dicta. Holding that "[t]he Public Records Act is simply an improper means to acquire knowledge of a trade secret" the Supreme Court went on to quote RCW 4.24.601 (**PAWS**, 125 Wn.2d at 263), which states:

> The legislature ... recognizes that protection of trade secrets, other confidential research, development, or commercial information **concerning products or business methods** promotes business activity and prevents unfair competition. Therefore, the legislature declares it a matter of public policy that the confidentiality of such information be protected and its unnecessary disclosure be prevented.

(emphasis added). Both the Supreme Court and the Legislature have restricted trade secrets to information "concerning products or business methods", and not garden variety financial and commercial information such as the proposed fees, malpractice insurance or references that constitute the Disputed Information in this appeal.

Other courts have held that information (like fees and insurance) provided in hopes of obtaining business is not a trade secret. **Summitbridge Nat. Investments LLC v. 1221 Palm Harbor, L.L.C.**, 67 So. 3d 448, 450 (Fla. Dist. Ct. App. 2011)("'**[Trade secret] differs from other secret information in a business ... in that it is not simply information as to single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract**....'" (emphasis added, citation omitted)); **St. Clair v. Nellcor Puritan Bennett LLC**, CV-10-1275-PHX-LOA, 2011 WL 5335559, *2 (D. Ariz. Nov. 7, 2011)(same); **Zimmer Spine, Inc. v. EBI, LLC**, 10-CV-03112-LTB-CBS, 2011 WL 4089535, *8 (D. Colo. Sept. 14, 2011)(same).

Other states have, just like the Supreme Court in **PAWS** suggested, restricted trade secrets to information continuously used in the operation of the business. See, **Medtech Products Inc. v. Ranir, LLC**, 596 F. Supp. 2d 778, 787 (S.D.N.Y. 2008)("A trade secret, however, is not simply information as to single or ephemeral events in the conduct of the business; rather, it is a process or device for continuous use in the operation of the business."); **Public Citizen Health Res. Group v. FDA**, 704 F.2d 1280, 1288 (D.C. Cir. 1983) (There must be a "direct relationship between the information at issue and the productive process"

for that information to be a trade secret.) The Disputed Information does not relate to Robbins' products or business methods for practicing law and thus is not a trade secret.

Additionally, in this context it is "illogical" for Robbins to claim that its Second Washington Response is a trade secret because the information was created for the AGO to use when selecting legal counsel. While the AGO's actions may incidentally advance Robbins' private interests the Disputed Information was indisputably provided to the AGO. Division Three found that similar information was not a trade secret. **Spokane Research**, 96 Wn. App. at 578. The **Spokane Research** Court first found that the government agency requested the information for a public use: "The City, not the Developers, requested the credit and financial studies from the professors and accountants for two purposes. First, for the City to investigate the credit and financial strength of the proposal for city decision making and negotiating. Second, for the City to use it to obtain favorable consideration of the HUD loan application." **Id.** The **Spokane Research** Court then ruled that although the "public purposes... may incidentally advance the Developer's private interests[,] [i]t is illogical for the Developers to claim the studies were at the outset trade secrets in this context because the studies were produced for the City, not the Developers." **Id**. The **Spokane Research** Court finished its analysis by

observing that "[i]f any conflict exists between the Act and the UTSA, it is resolved by the application of RCW 42.17.920 that provides the Act is to be liberally construed with conflicts between the Act and other statutes resolved in favor of the Act." **Id.** citing, **PAWS,** 125 Wn.2d at 262, 884 P.2d 592.

Similarly, the Disputed Information here was not a trade secret that is utilized by Robbins in its business, but rather simple factual information provided to the AGO to use in letting a public contract. Just as Division Three found in **Spokane Research**, Robbins has no logical basis to assert that information provided to a public agency to make a public decision is somehow a trade secret.

Finally, the overbroad nature of Robbins' usage of "trade secret" to include the garden variety types of financial and commercial information consisting of its fee proposal and malpractice insurance is shown by the fact that the legislature provided specific exemptions for financial and commercial information in a wide variety of specific bid and application situations. If "trade secret" was interpreted as broadly as Robbins claims, then it would render meaningless all references in the PRA to financial and commercial information. In a related FOI context, the House Committee on Government Operations specifically recognized this danger in 1978: "If a trade secret can be any information used in a business

which gives competitive advantage, then there is little or no information left that could qualify as commercial or financial information under the second category of the exemption without also qualifying as a trade secret. **This definition is therefore inconsistent with the language of the act** as well as with the general approach taken by the courts to the concept of confidential business information." **Public Citizen,** 704 F.2d at 1289 (citing H.R. Rep. No. 1382, at 16 (95th Cong., 2d Sess. (1978)) (emphasis in original).

c) The Disputed Information Is Not A Trade Secret Because It Has No Value To Competitors

The Disputed Information is not a trade secret because it is of no value to competitors. See, **McCallum,** 149 Wn. App. at 425 ("[A] trade secret must derive independent economic value from not being known to or generally ascertainable by others who can obtain economic value from their disclosure or use."); **Buffets, Inc. v. Klinke**, 73 F.3d 965, 969 (9th Cir. 1996)(In holding that manuals were not trade secrets, the court acknowledged "there is little to suggest that any value was obtained from the manuals being kept secret.").

First, Robbins did not seek to stop publication of the Disputed Information from the First Washington Response to law firms in direct competition with Robbins for the AGO's business. Second, Robbins

provided no record evidence proving where competitors used any published information from the First Washington Response or Florida Response to either harm Robbins or for their own economic advantage.

Robbins seeks to prevent Requestor from obtaining this information, not because it is concerned that Requestor will compete with it for public pension plan clients, but rather because it fears Requestor will publish fee information in their Second Washington Response that would be useful to federal court judges attempting to determine market rates for securities actions and that may also be inconsistent with Robbins' 30-40%, market rate representations to federal judges. (See, §VII.C.2).

C. The Court Erred By Not Applying The Higher Injunction Standard Of RCW 42.56.540 Which Requires Robbins To Address The Public Interest Or Prove "Irreparable Damage To Vital Government Functions"

Even assuming arguendo that a specific PRA exemption exists, which is does not, see §VII.B, the Superior Court erred by failing to apply the stringent requirements of RCW 42.56.540 which additionally[11]

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[11]The requirements of RCW 42.56.540 are in addition to the requirement that the information is subject to an exemption under the PRA. See, **Soter v. Cowles Pub. Co.**, 162 Wn. 2d 716, 756-57, 174 P.3d 60, 81-82 (2007)("We therefore clarify that to impose the injunction contemplated by RCW 42.56.540, the trial court must find that a specific exemption applies *and* that disclosure would not be in the public interest and would substantially and irreparably damage a person or a vital government interest. RCW 42.56.540."); **Yakima v. Yakima Herald-Republic**, 170 Wn. 2d 775, 807-08, 246 P.3d 768, 783 (2011) ("The court must find that

requires that an enjoiner, like Robbins, must also prove disclosure "would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions." RCW 42.56.540. Here the Superior Court applied the lower balancing factor test under the general equitable provisions for preliminary, not permanent, injunctions relying primarily on the non-PRA case, **Tyler Pipe Indus., Inc. v. Dep't of Revenue**, 96 Wn.2d 785, 638 P.2d 1213 (1982). The less rigorous **Tyler Pipe** standard only required Robbins to show an applicable exemption applied and that disclosure would cause harm to Robbins. Pursuant to the **Tyler Pipe** standard used in Division Two, the Superior Court issued an injunction without addressing Requestor's "public interest" arguments pertaining to the integrity of either State purchase decisions (§VII.C.1) or securities class action fee awards (§VII.C.2). Finally, the Superior Court erred by conflating the terms "public loss" in RCW 42.56.270(1) with the "substantially and irreparably damage vital governmental functions" requirement of RCW 42.56.540.

As set forth below, proper application of the standards of RCW 42.56.540 demonstrates yet another reason—in addition to the lack of an

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a specific exemption applies and that disclosure would not be in the public interest and would substantially and irreparably damage a person." citing **Soter**, 162 Wn.2d at 757.)

exemption—why Robbins is not entitled to enjoin production of these public records.

1. There Is A Strong Public Interest In Open Government, Particularly Decisions Involving The Purchase Of Goods Or Services

This appeal will answer important questions regarding whether competitors for state business can keep secret information they voluntarily provide the state regarding the:

> (1) prices at which they are willing to provide goods and services to the State?
>
> (2) insurance they have available to protect the State from liability?
>
> (3) references they use to persuade the State that they are competent and ethical?

Here the Superior Court erred by ruling that Robbins could keep all of this information secret based on conclusory and generic arguments that would be equally applicable to any seeker of state business who doesn't want the public to know what it promised and represented during the state's decision making process. If Robbins is allowed to keep its proposed prices secret based on naked claims that such are trade secrets or confidential, then any widget manufacturer could do the same thing.

If the Superior Court's decision stands, then state purchase decisions will be rendered opaque. No one will know whether the state (a) chose the lowest price or the highest price, (b) adequately considered the vendors'

insurance policies that protect the state from liability, or (c) carefully vetted references for ethics and competence.

This secrecy will disable the public from questioning purchase decisions, much less being able to hold state bureaucrats accountable for purchase decisions. Secrecy exponentially increases the opportunity for corruption. Secrecy empowers bureaucrats to make decisions based, not on the public interest, but on bribes, favors and cronyism without the public ever being the wiser.

Such concerns are particularly relevant where Robbins is concerned. In September, 2007 the founding partner of Robbins predecessor firm (CP 673 ¶63), William Lerach, pleaded guilty to a federal conspiracy charge relating to "secret payment arrangements with named plaintiffs in class-action lawsuits." CP 802-803. Named plaintiffs were generally promised kickbacks equal to 10% of the firm's fees. CP 803.

More recently, Robbins was involved in controversy regarding the "pay for play" scandals. See, *Trial Lawyers Contribute, Shareholder Suits Follow* (CP 810-814), a Wall Street Journal Article that listed Robbins predecessor firm, Coughlin Stoia Geller Rudman & Robbins LLP, as the law firm that gave the second most campaign contributions to out-of-state candidates from 2000 to mid-2009. CP 811. Robbins predecessor firm is featured prominently in the article. CP 814. Public scrutiny is necessary

to make sure that state purchase decisions are made based on the public interest rather than kickbacks and cash.

Class action fees can amount to hundreds of millions of dollars and it is important that Washington's decision making process for retaining securities counsel be free from secrecy and taint, particularly where Robbins is concerned.

Even Robbins' Portfolio Monitoring Program is not free from public interest and controversy. Recently Federal District Court Judge Rakoff has raised concerns regarding Robbins' portfolio management program saying "the practice fosters the very tendencies toward lawyer-driven litigation that the PSLRA was designed to curtail and questioned whether "the seeming conflict of interest inhering in this arrangement violated ethical prohibitions" CP 341. (Entire Order of US District Court Judge Rakoff at CP 337-348).

In light of the public controversy surrounding the ethics of the PMP program, it is reasonable to require public disclosure of the names of PMP participants in Robbins Second Washington Response whose identities have already been revealed elsewhere.

Finally, the amount of malpractice insurance is also highly relevant to the public exercising knowledgeable review of state decisions. Robbins' conduct again demonstrates why the amount of malpractice

insurance it carries is particularly relevant. For example, recently another federal judge commented upon Robbins' conduct in connection with a case against Washington's own Boeing Corporation. Robbins was representing the plaintiff and of its work US District Court Judge Conlon stated:

> "The reality is that the informational basis for [key parts of the second amended complaint] is at best unreliable and at worst fraudulent," she wrote. "More significantly, this unseemly conflict between plaintiffs' confidential source and plaintiffs' investigators could have been avoided by reasonable inquiry on the part of plaintiffs' counsel before filing the second amended complaint, and, later, by making flawed representations directly to the court about the confidential source's position" *City of Livonia Employees' Ret. Sys. v. The Boeing Co.*, 09 C 7143, 2011 WL 824604 (N.D. Ill. Mar. 7, 2011)

Robbins is clearly a firm that needs to be well-insured and the public needs assurances that it has sufficient malpractice insurance to protect the state.

Robbins' past and present conduct makes clear the important role that public scrutiny has in state decisions. Whether the state is considering the purchase of legal services or road construction, in all cases where the state is considering a purchase, the public should be entitled to the basic factual information provided to the state about pricing, insurance and references. No injunction should issue under RCW 42.56.540 because enjoining from public disclosure such basic factual information sought

here which was provided to the state for use in a purchase decisions is strongly against the public interest.

2. The Superior Court Ignored The Public Interest In Assuring Reasonable Market-Based Fees In Securities Class Actions

Over the years Robbins has sought and been paid hundreds of millions in legal fees in class action lawsuits by federal judges across the nation. (See, §IV.E). The criteria used by federal courts includes a consideration of market rates.

The Supreme Court in **Missouri v. Jenkins,** 491 U.S. 274, 285, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989) held that in determining attorneys' fees, "we have consistently looked to the marketplace as our guide to what is 'reasonable'." See also, **Hensley v. Eckerhart**, 461 U.S. 424, 447, 103 S.Ct. 1933,1946-47, 76 L.Ed.2d 40 (1983) (Brennan, J., concurring in part and dissenting in part, observing that that "[a]s nearly as possible, market standards should prevail, for that is the best way of ensuring that competent counsel will be available to all persons."); **Goldberger v. Integrated Resources, Inc.,** 209 F.3d 43, 52 (2d Cir.2000) (explaining "that market rates, where available, are the ideal proxy for [class counsel's] compensation"); **In re Synthroid Mktg. Litig.**, 325 F.3d 974, 975 (7th Cir. 2003) ("A court must give counsel the market rate for legal services . . . .").

The Fee Proposal in Robbins' Second Washington Response is part of that "market" that federal judges are instructed to consider in order to determine reasonable fee awards in federal securities class action cases. Robbins consistently represents to federal court judges faced with fee decisions that courts should pay attention to the market rates and further represents that the market rate if an individual client were negotiating fees in a contingent securities lawsuit, is 30-40% of the recovery.

Is this true? Does Robbins' Fee Proposal made to the AGO in the Second Washington Response fall within Robbins 30-40% representation, or is it significantly lower?

Because the fee proposal in Robbins' Second Washington Response is still secret, only this Court can compare the fee proposal therein to Robbins' ongoing 30-40% representations made to federal judges. It is clear that the public's strong interest in reasonable fees mandates that the public have access to Robbins' fee proposal. Even Mr. Robbins admitted that it is in the class's interest that attorneys' fees be set at reasonable levels and federal judges have information they deem relevant so as to set attorneys' fees at reasonable levels. CP 1111-1112 at 73:16-74:14. He further admitted "I believe it is in the public interest that all legal fees be set at reasonable levels to ensure the public's views and the integrity of the legal process." CP 1113 at 75:6-8. On these points he is correct.

It is clearly, and unequivocally, in the public interest that federal judges faced with decisions about awarding millions in fees from class members—who have already been defrauded once—have accurate and complete information so as to award only a reasonable fee to class counsel. The fee information in the Second Washington Response is important evidence of market rates. Washington's RFQQ sought not just "Qualifications" but "Quotations" as well. Such quotations of fee structures provided by sophisticated securities counsel to sophisticated clients with potential securities cases are all highly relevant evidence for federal judges examining market rates and establishing reasonable compensation. Mr. Robbins when asked: "In the context of securities class action lawsuits, are market rates for attorneys' fees relevant for judges when setting attorneys' fees?" answered "Yes." CP 1115 at 77:18-24.

Robbins improperly seeks to use the injunction procedure under RCW 42.56.540 to harm the public interest by keeping its fee information secret. Should federal judges become aware that the same Robbins who in their court's is asserting market rate fees are 30 to 40% in securities actions, is secretly offering to perform the same services to public pension plans like the State of Washington's at a fraction of proclaimed market

rates,[12] then Robbins fees would likely go down, and the amounts paid to class members, like for example the Washington State Investment Board[13] would go up which is strongly in the public interest.

3. The Superior Court Ignored The Additional Requirement Robbins Prove Disclosure Would Cause Substantial And Irreparable Damage To Vital Government Functions

The Superior Court erred by conflating the concepts of "public loss" that an agency has to demonstrate under RCW 42.56.270(1) with the much more stringent requirement that a third party enjoiner must meet under RCW 42.56.540 to prove that disclosure would cause "substantial and irreparable damage to a vital government function." Robbins made no such showing. Moreover, that the AGO was able to conduct its 2010 selection process, despite disclosing Robbins First Washington Response to nine competitors in 2005, shows that disclosure does not cause any "public loss" or "damage" due to chilled bidding.

D. The Court Erred By Ruling Upon A Moot Issue

On 2/17/2011 the Superior Court ruled that Requestor did not prevail with respect to any public record he sought. Prevailing is a condition precedent to an award of penalties, costs and reasonable attorney fees.

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[12] As noted above, at this point only this Court can compare Robbins' Fee Proposal percentages in the unredacted CP at 1466-1692 to the 30-40% representation made to federal courts.

[13] The Washington State Investment Board is a passive class member in some securities class actions. CP 1167 at 47:4-7. Thus, its recovery is impacted by the amount of attorneys' fees. CP 1168 at 48:18-23.

Sanders v. State, 169 Wn. 2d 827, 848, 240 P.3d 120, 131 (2010); RCW 42.56.550(4). Despite the fact that as of 2/17/2011 Requestor had no right to costs and fees because he had not prevailed, on 4/20/2012 the Superior Court ruled on the, then moot, merits arguments in the State's summary judgment motion regarding why the State would not have been liable for costs, fees and penalties in any event. The State's motion was improperly decided because this issue became moot at the time the Superior Court ruled Requestor was not entitled to the public records. **Diversified Indus. Dev. Corp. v. Ripley**, 82 Wn. 2d 811, 814-15, 514 P.2d 137, 139 (1973) (A justiciable controversy is required otherwise "[t]he court steps into the prohibited area of advisory opinions.").

E. If Requestor Prevails With Respect To Any Disputed Information, Then Requestor Is Entitled To Cost, Fees and Penalties

Moreover, if Requestor becomes the prevailing party (in whole or part), then he should be awarded costs, fees and penalties. The AGO, allowed one of its employees to interfere with Requestor's attempt to obtain public records that the AGO was willing to produce. (See, §V.A). This employee's conduct facilitated Robbins' litigation against Requestor. The AGO as employer is liable under respondeat superior and thus should pay appropriate penalties for the actions of its employee. **Brown v. Labor Ready NW. Inc.,** 113 Wn. App 643, 646, 54 P.3d 166 (2002) (employer

vicariously liable for actions of employee). **See also, Rahman v. State,** 170 Wn.2d 810, 818–19, 246 P.3d 182 (2011) (The principle of respondeat superior is based upon the premise that an employer is in the best position to control the actions employees.)

VIII. CONCLUSION

Based on the foregoing, Requestor, Appellant Gresham respectfully requests that the Court reverse the trial court's permanent injunction and summary judgment orders, instruct the AGO to provide the Disputed Information and award Requestor fees, costs and a statutory penalty as the prevailing party.

RESPECTFULLY SUBMITTED this 24th day of September, 2012.

ALLIED LAW GROUP
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By _____
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CERTIFICATE OF SERVICE

I, Michele Earl-Hubbard, certify that on September 24, 2012, I served on the following a copy of the foregoing Brief of Appellant by email pursuant to agreement and by first class mail and Reports of Proceedings for 10/21/11, 11/4/11, 11/18/11, 2/17/12, and 4/20/12 proceedings by email pursuant to agreement:

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DATED this 24th day of September, 2012.

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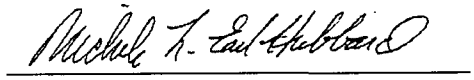

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